

No. 14722

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

ULP-28-1976

BOARD OF TRUSTEES OF BILLINGS
SCHOOL DISTRICT NO. 2, of Yellowstone
County, Montana,

Petitioner and Appellant,

-vs-

STATE OF MONTANA, ex rel. BOARD OF
PERSONNEL APPEALS and BILLINGS EDUCATION
ASSOCIATION, a Montana non-profit corporation,

Defendant and Respondent.

Appeal from: District Court of the Thirteenth Judicial District,
Honorable Robert Wilson, Judge presiding.

Counsel of Record:

For Appellants:

James C. Capser argued, Billings, Montana

For Respondent:

Hilley and Loring, Great Falls, Montana
Benjamin Hilley argued, Great Falls, Montana
Jerry Painter, Helena, Montana

Submitted: September 21, 1979

Decided: DEC 21 1979

Filed: DEC 21 1979

Thomas J. Keasney
Clerk

Mr. Chief Justice Frank L. Russell delivered the Opinion of the Court.

On July 18, 1977, a hearings examiner held that a school teacher had been dismissed in violation of her rights and that the Billings School District (School District) had interfered with this employee's rights. The hearings examiner ordered reinstatement with full back pay and benefits. On August 5, 1977, the School District filed exceptions to the order of the hearings examiner. On the day of the hearing on this matter the School District filed a motion to reopen the record to take additional evidence. On November 1, 1977, the Board of Personnel Appeals (BPS) affirmed the findings of fact, conclusions of law, and proposed order of the hearings examiner.

The School District filed for judicial review and made a motion to reopen the record before the District Court. The motion was denied and subsequently the District Court affirmed the BPS. From this judgment the School District appeals.

Ms. Widenhofer, the teacher on whose behalf the unfair labor practice charge was filed by the Billings Education Association (BEA), was first employed as a teacher in the School District during the years 1959-61. In 1973, she was again employed by the School District and taught a sixth grade class at the Poly Drive School during the academic years 1973-76. During this latter period Ms. Widenhofer was an active member of the BEA, serving as an alternate building representative, a member of the Legislative Committee, and a member of the Strike Financial Aid Committee.

From the record it appears that the School District was initially satisfied with Ms. Widenhofer's performance as a teacher. During the agency hearing on this matter the BEA introduced as exhibits written evaluations of Ms. Widenhofer's performance as a teacher. These evaluations, which uniformly gave Ms. Widenhofer good and excellent ratings in all areas, were written by the

Poly Drive principal and date from October 8, 1973, until March 3, 1975. The areas upon which the evaluations were based included personal traits, teacher-pupil relationships, instruction skills, classroom management, staff relationships and professional traits and teacher-pupil-community relations. During this time Ms. Widenhofer was a nontenured teacher.

The BEA called an economic strike on October 2, 1975, and Ms. Widenhofer, along with eight other teachers at Poly Drive went out on strike. Apparently, 162 nontenured teachers in the School District failed to report to work during the strike. Ms. Widenhofer had been active in prestrike preparations and along with another Poly Drive teacher, Ms. Sayler, actively picketed the Poly Drive School. Ms. Widenhofer had been active in encouraging her colleagues to participate in and support the strike. Ms. Widenhofer was the only nontenured Poly Drive teacher to picket her own school. Her picketing was visible as the parents delivered and picked up their children from school. On the first day of the strike, some of Ms. Widenhofer's students utilized anti-strike placards. Ms. Widenhofer continued to picket the Poly Drive School until October 17, 1975. Three days later, the strike was settled.

Soon after the strike was settled Ms. Widenhofer encountered problems with certain parents and school officials. On November 20, 1975, she and Ms. Sayler were asked to meet with a group of seven parents. These parents were concerned about a comment Ms. Sayler had made concerning her class. They also were upset with Ms. Widenhofer because she had asked a student where her mother had taught during the strike and because she had given a test in which all of her sixth grade classes had performed poorly. Later, the parents of another child came to school very upset and requested a conference with Ms. Widenhofer in regard to her questioning of their child as to the method in which a homework assignment was done.

As to these and other poststrike events the hearings examiner made the following findings:

"10. On November 20, 1975, a group of seven parents asked to have a meeting with Ms. Saylor and Ms. Widenhofer. One of the parents involved was Ms. Bowman.

"a. Notice of the meeting was given to the two teachers involved after lunch that there was going to be a meeting with the parents that afternoon.

"b. The meeting concerned a question asked by Ms. Widenhofer of Ms. Bowman's daughter, Amy, as to which school Ms. Bowman taught at during the strike. Evidently Ms. Bowman filled in as a teacher when the teachers struck. Ms. Bowman claimed that the school was intimidating and psychologically damaging her child by asking this type of question of Amy.

"c. The other parents at the conference were parents of Ms. Saylor's students and they were annoyed because Ms. Saylor had told them that the group of sixth graders were a tough group to handle.

"d. Finally the parents were upset because Ms. Widenhofer had given a test in which the four sixth grade classes had done poorly.

"11. After the meeting with the parents, Ms. Saylor and Ms. Widenhofer expressed their concern over the meeting to Mr. Croff, the school principal, and stated that the next time they would either like to have a tape recorder or a BEA representative present. Mr. Croff stated that a tape recorder could not be used without the permission of all persons present at the meeting and also said that the meeting concerned the teachers and parents and to keep the BEA out of it.

"12. At the same conversation with Mr. Croff, Mr. Croff indicated to Ms. Widenhofer that he was disappointed that she had gone out on strike against him because he had hired her.

"13. In another incident, Ms. Widenhofer assigned her class to make a family coat of arms. One child made the coat of arms on old paper. Ms. Widenhofer questioned the child if she had done it. When the child replied, 'yes', Ms. Widenhofer pointed out that the paper was old and the scotch tape was yellowed. The parents of the child came to the school very upset and explained that the child had used materials that the mother had kept from when she had taught kindergarten.

"a. Mr. Croff did not attend the meeting with the parents even though it was his policy to usually attend meetings with parents and teachers.

"14. On January 18, 1976, Ms. Widenhofer and Ms. Saylor again talked to Mr. Croff concerning some rumors that there was a drive to have them removed from their teaching position. Mr. Croff remarked that the rumors were from the BEA rumor mill. Mr. Croff went on to remark that he had heard rumors that there was a petition being circulated concerning Ms. Widenhofer's removal.

"15. On February 3, 1976, Mr. Frank, assistant superintendent of school [sic] in the elementary division visited Ms. Widenhofer's room. No written evaluation resulted from that visit.

"a. After Mr. Frank visited Ms. Widenhofer's room, Ms. Widenhofer had a conference with Mr. Frank. Mr. Frank indicated that he was not there to save Ms. Widenhofer's life or skin, that it might be too late for that. Mr. Frank indicated that everyone else in the district had gotten back to normal after the strike except Ms. Widenhofer, that she had held a grudge and that she had upset several parents, and that he had had several phone calls about it. He went on to state that Ms. Widenhofer was not getting along with the staff at Poly Drive and that he, Mr. Frank, did not feel welcome in Ms. Widenhofer's room.

"b. Ms. Widenhofer asked if Mr. Frank thought a transfer would be feasible. Mr. Frank stated no, that they would not bow to parent pressure any more as far as transfers go.

"c. Mr. Frank said no one should know what was said during the conference except for Ms. Widenhofer's husband. Mr. Frank's suggestion for improvement was that Ms. Widenhofer try to be pleasant and smile a lot. Nothing was said about Ms. Widenhofer's classroom performance.

"16. Mr. Frank again visited Ms. Widenhofer's classroom on February 12, 1976. Upon his leaving Ms. Widenhofer asked if he had heard anything more from any parents. Mr. Frank said no, and said that he knew Ms. Widenhofer could do the job, just keep smiling.

"17. On February 20, 1976, Ms. Widenhofer had a discussion with Mr. Croff. Mr. Croff came into her classroom when she was free and said that nine letters had been admitted to the school board, to Mr. Frank and himself, by parents who were unhappy with what Ms. Widenhofer was doing.

"a. Four of the letters had been written by parents whose children had been in Ms. Widenhofer's class in previous years.

"b. Although Ms. Widenhofer requested to see them, and although Mr. Croff agreed to show them to her, later he changed his mind and decided that she should not see them since they had been addressed to him.

"18. On February 20, 1976, Mr. Croff asked Ms. Widenhofer how she felt about the situation and if she would ever strike again. Ms. Widenhofer responded that she would never put her family through it again.

"a. Ms. Widenhofer asked Mr. Croff if he felt all the problems she was having were strike related. Mr. Croff responded that he felt that they were directly strike related. That the parents had indicated to Mr. Croff that they were unhappy with Ms. Widenhofer because she had gone out on strike.

"19. Mr. Frank again visited Ms. Widenhofer's classroom on February 24, 1976. Mr. Frank's only comment was to keep smiling.

"20. Mr. Croff told Ms. Widenhofer that he had to attend a school board meeting to discuss Ms. Widenhofer's evaluation. After the meeting he came into Ms. Widenhofer's classroom and told her that he had said as many positive things about her as he could, but that he did not feel that any decision had been reached at that time." (Citations to transcript omitted.)

On December 19, 1975, Ms. Widenhofer was again evaluated by Mr. Croff. The hearing examiner found that the tenor of this evaluation was negative with respect to Ms. Widenhofer's teaching performance. The evaluation contained the following comments: "You have demonstrated support for your professional organization." While Ms. Widenhofer's request for a transfer was refused by Mr. Frank, Ms. Saylor, the other Poly Drive teacher who picketed her own school, but who was tenured, received a transfer for the next school year.

At one point Mr. Croff made it clear to Ms. Widenhofer that "all of this trouble" was caused by her membership in the BEA.

On or about March 16, 1976, the School Board met and discussed the matter of the renewal of Ms. Widenhofer's employment contract. The record establishes that the school board questioned Mr. Frank and Mr. Croff closely concerning Ms. Widenhofer and their evaluations of her. Ms. Widenhofer was informed by a school board member, Ms. Heizer, that no one had been fired at the March 16, 1976, meeting. Nevertheless, the official minutes of the School District for that meeting indicate that the decision to terminate

Ms. Widenhofer's employment was made on that date. Ms. Widenhofer was notified by letter of the Board's decision on April 9, 1976. This letter stated, in part, that "[t]he reason for nonrenewal is unsatisfactory evaluations by your Principal."

The issues presented by this appeal are as follows:

I. Did the BEA meet its burden of proof requirement in establishing that an unfair labor practice had occurred?

II. Was it error for the BPA and the District Court to affirm the hearing examiner in the absence of evidence which established that the Board of Trustees of the School District knew of Ms. Widenhofer's strike activities?

III. Was it error for the hearing examiner, the BPA, and the District Court to fail to make the finding that Ms. Widenhofer's discharge would not have occurred 'but for' her protected, union activity?

Appellants are contending that there is an insufficiency of proof to show that an unfair labor practice occurred in this case. The complaint which was originally filed in this action alleged violations of section 39-31-401(1) & (3), MCA. These statutes define unfair labor practices of public employers. In the event of a charge of an unfair labor practice under these statutes the Board of Personnel Appeals must conduct a hearing. Section 39-31-405, MCA. The complainant's case must be established by a preponderance of the evidence before an unfair labor practice may be found. Section 39-31-406, MCA.

The scope of judicial review for an unfair labor practice case is provided by section 39-31-409, MCA. This statute provides, in essence, that the courts are not to substitute their judgment for that of the agency. The findings of the board as to questions of fact are conclusive if supported by substantial evidence on the record considered as a whole. Section 39-31-409(4).

In *Vita Rich Dairy, Inc. v. Dept. of Business Regulations*

(1976), 170 Mont. 341, 553 P.2d 980, this Court had occasion to discuss and comment upon the purposes of limited judicial review of agency decisions. Several reasons are given for the desirability of this approach. This Court summarized one of the reviewing court's functions as follows:

"The agency's actions need a balancing check. In the absence of a body within the agency which is separated from the actual decision and in which all parties have confidence, a limited judicial inquiry to see (a) that a fair procedure was used, (b) that questions of law were properly decided and, (c) that the decision is supported by substantial evidence is necessary." 170 Mont. at 345.

"Substantial evidence has been defined by this Court as such as will convince reasonable men and on which such men may not reasonably differ as to whether it establishes the plaintiff's case, and, if all reasonable men must conclude that the evidence does not establish such case, then it is not substantial evidence. The evidence may be inherently weak and still be deemed 'substantial', and one witness may be sufficient to establish the preponderance of a case." Olson v. West Fork Properties, Inc. (1976), 171 Mont. 154, 158, 557 P.2d 821.

In the instant case the agency decision is well documented. The references to anti-union animus of the parents and of Mr. Croff and Mr. Frank runs to several pages. Some of the more striking examples are: Mr. Frank's comments on February 3, 1976, to the effect that he could not save Ms. Widenhofer's "skin" and that everyone else was back to normal after the strike; the fact that only the detrimental letters appeared in Ms. Widenhofer's file; Mr. Croff's statements that Ms. Widenhofer's problems were all strike related; and Mr. Croff's remarks that the parents were unhappy over Ms. Widenhofer's strike activities. This evidence stands uncontradicted. There are more examples of anti-union animus, but the above examples serve the purpose of establishing substantial evidence. This Court finds that there was substantial evidence to support the finding of anti-union animus and the commission of an unfair labor practice.

The appellants allege that it was error to find an unfair

labor practice where the hearings examiner made a finding that the trustees did not know of Ms. Widenhofer's union activities. There are no Montana cases which deal with this precise point. Therefore, it is helpful to consider cases from jurisdictions which have dealt with the issue of the employer's knowledge of the employee's protected union activities. There are federal cases which discuss the knowledge requirement under §8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3). This federal statute is identical, in pertinent part, to the statute under which the instant case was brought. Section 39-31-401(3), MCA. These statutes say:

"It shall be [is] an unfair labor practice for an [a public] employer [to]:

" . . .

"(3) by discrimination [discriminate] in regard to hire or tenure of employment or any term or condition of employment [in order] to encourage or discourage membership in any labor organization . . ." (Differences in Montana Act are bracketed.)

In *NLRB v. Whittin Machine Works* (1st Cir. 1953), 204 F.2d 883, the Court said:

"When a charge is made that by firing an employee the employer has exceeded the lawful limits of his right to manage and to discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he had engaged in a protected activity. (Cites omitted.) Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. (Cites omitted.) The first and second points constitute discrimination and the practically automatic inference as to the third point results in a violation of §8(a)(3)." 204 F.2d at 884.

In the instant case, the trustees had the sole authority to hire and fire teachers. The hearings examiner found that the trustees were unaware of Ms. Widenhofer's union activities. The hearing examiner dealt with this point as follows:

" . . . since Mr. Croff is an agent of the school board, the school board is responsible for his

behavior and having dismissed Mrs. Widenhofer because of Mr. Croff's evaluation as was stated in her letter of nonrenewal, they terminated Ms. Widenhofer because of her union activity."

We hold that the appellants have committed an unfair labor practice despite the trustees' lack of knowledge of Ms. Widenhofer's union activities. Under the usual employer-employee relationship, there cannot be discrimination unless the employer knows of the protected activity. However, in the circumstances presented by this case, we are not dealing with a usual employee-employer relationship. The authority to hire or not hire is vested with the trustees, but their decision not to hire in this case was based on a tainted evaluation. The hearings examiner found a direct connection between the tainted evaluation and the decision not to hire. In other words, Ms. Widenhofer was denied employment because of her protected union activities. This violates her rights under section 39-31-401, MCA.

We reach this decision without imputing knowledge to the trustees. An anti-union act was committed when Mr. Croff presented the tainted evaluation to the trustees. The trustees are responsible for this action by Mr. Croff. They relied upon this evaluation, thereby committing the prohibited act of discrimination. They may not insulate themselves by claiming lack of knowledge. If we were not to adopt such a policy a school board could violate a public employee's rights with impunity in almost every instance. We do not believe that the legislature intended that public employees' rights should be disregarded in such a manner.

Appellant's last contention concerns the application of the correct legal test to be used in a case where the employer's motivation is a material question. The task of determining motivation is not easy, and agencies and courts must rely on the outward manifestations of the employer's subjective intent. The task is compounded in employment cases where there exist permissible

and impermissible reasons for a particular discharge. This is a problem of dual motivation.

Ms. Widenhofer was a nontenured teacher. The services of a nontenured school teacher may be terminated without cause, as long as the termination is not because of an impermissible reason. *Branch v. School District No. 7* (D.C. Mont. 1977), 432 F.Supp.508, 509. Since no reason need be given for dismissing a nontenured teacher such as Ms. Widenhofer, the present case presents a dual motivation problem.

Courts have devised several tests to use when confronted with this problem. The trouble with most of these tests is that employees could conceivably place themselves in a better position by engaging in protected activity than they would have been had they not engaged in such conduct. The United States Supreme Court had occasion to address and resolve this situation in *Mt. Healthy City Board of Education v. Doyle* (1977), 429 U.S. 274, 97 S.Ct. 568, 50 L Ed 2d 471.

In *Mt. Healthy* a nontenured school teacher was fired. There were several reasons given for this action. One of the reasons for the termination was a protected free speech activity. There were additional reasons which involved nonprotected activity and these additional reasons were adequate reasons to discharge a teacher. The lower court held that the teacher could not be discharged because one of the reasons given involved a protected activity. The Supreme Court reversed the lower court on the issue of motivation or causation. The Supreme Court handled the problem as follows:

"A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would

require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principal at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

"This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord 'tenure'. The long-term consequences of an award of tenure are of great moment both to the employee and the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of the fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

" . . .

"Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." 429 U.S. at 285-287.

Even though the Mt. Healthy "but for" test dealt with first amendment rights, some Federal Circuit Courts have adopted this test in labor law dual motivation cases. The First Circuit specifically adopted this test in Colletti's Furniture, Inc. v. NLRB (1st Cir. 1977), 550 F.2d 1292. This was reaffirmed in NLRB v. Rich's of Plymouth, Inc. (1st Cir. 1978), 578 F.2d 880, 887. The Second Circuit has also applied the Mt. Healthy causation test to the federal labor law field in the case of United States v.

On the other hand the Fifth Circuit has refused to adopt the Mt. Healthy test in labor law cases. In Federal Mogul Corp. v. NLRB (5th Cir. 1978), 566 P.2d 1245, 1265, Thornberry, J. specially concurring, said:

"The Supreme Court has utilized a 'but for' test in first amendment cases, e.g., Mt. Healthy City School District v. Doyle, 429 U.S. 274, 37 S.Ct. 568, 50 L Ed 2d 471 (1977), but that hardly means the test is appropriate in the labor context. In Mt. Healthy the Court, as it has done so often, struck a balance between competing interests. Similar competing interests exist in the labor setting, but there Congress has already established a balance by passing the labor laws. That balance favors the employee, for Congress clearly recognized the superior bargaining position of the employer. See American Shipbuilding Co. v. N.L.R.B., 380 U.S. 300, 316, 85 S.Ct. 955, 966, 13 L Ed 2d 835 (1965) (labor laws attempt to redress the 'imbalance of economic power between labor and management'). The 'but for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy and the case law in this Circuit."

We do not find in the Montana statutes a policy which tips the balance in favor of either the public employee or employer. The policy is stated in pertinent part, as follows:

" . . . it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Section 29-31-101, MCA.

It must be noted, as it was in Federal Mogul, that the courts are attempting to balance competing interests. Mt. Healthy balanced first amendment rights against the need of a school district to be able to dismiss a person who obviously deserved to be dismissed for permissible reasons. Labor law rights under Montana law should not be given a higher degree of protection than federal first amendment rights are given. The Mt. Healthy 'but for' test is adopted for dual-motivation cases under Montana's Collective Bargaining Act. This adequately protects the interests and rights of both parties.

In the instant case it is not readily apparent which test the hearings examiner applied. The language used by the hearings examiner is as follows:

" . . . it becomes clear that this Board's authority is limited to that instance where it can be shown that an employee was discharged for union activity. However, if the discharge was partially motivated by the employee's union activity, it is unlawful. Finally if there is substantial evidence that an employee was illegally discharged for union activity, then the burden is on management to show the reason for discharge was not union related."
(Emphasis added.)

A comparison of this language with the following Mt. Healthy passage is instructive:

" . . . the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."
(Emphasis added.) 429 U.S. at 287.

Even though the two passages are not identical they are saying the same thing. The hearings examiner was, in essence, using the 'but for' test.

Affirmed.

Frank J. Horswell
Chief Justice

We concur:

John D. Daly

John Conway Harrison
Justices

Frank E. Blair
Hon. Frank E. Blair, District
Judge, sitting in place of Mr.
Justice John C. Sheehy.

Daniel J. Shea
Justice

IN THE MATTER OF UNFAIR LABOR PRACTICE #28-76:

BILLINGS EDUCATION ASSOCIATION, an
affiliate of MONTANA EDUCATION ASSOCIATION,

Complainant,

-vs-

SCHOOL DISTRICT NO. 2, and BILLINGS
HIGH SCHOOL DISTRICT, BILLINGS, MONTANA,

Defendants.

FINAL ORDER

A Proposed Findings of Fact, Conclusions of Law and

Proposed Order was issued in the above-entitled matter on July 18, 1977. The Proposed Order provided in part (1) That Helen Widenhofer shall be reinstated as an elementary teacher in the school district in any school mutually agreeable to Ms. Widenhofer and the School District other than the Poly Drive Elementary School.

Exceptions to that Proposed Order were filed by Defendants on August 5, 1977.

Briefs were filed with this Board and oral arguments were presented by all parties to the matter on September 23, 1977.

After having read the briefs submitted by the parties to the matter and having heard oral arguments, this Board issues the following Final Order:

This Board sustains the hearing examiner's Proposed Findings of Fact, Conclusions of Law and Order with the exception that the Proposed Order (1) read as follows, "That Helen Widenhofer shall be reinstated as an elementary teacher in the school district."

IT IS THEREFORE ORDERED:

1. That the Proposed Findings of Fact, Conclusions of Law and Order of the hearing examiner dated July 18, 1977 be amended to provide (1) That Helen Widenhofer be reinstated as an elementary teacher in the school district.

1. That the findings of fact, conclusions of law and
Proposed Order of the hearing examiner in its amended form
is adopted and is incorporated by reference as the Final
Order of this Board.

Dated: November 1st, 1977.

BOARD OF PERSONNEL APPEALS

By Erant Cronley
Erant Cronley, Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS
IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #28-76:

BILLINGS EDUCATION ASSOCIATION, an
affiliate of MONTANA EDUCATION ASSOCIATION,

Complainant,

-VS-

U.L.P. #28

SCHOOL DISTRICT NO. 2, and BILLINGS
HIGH SCHOOL DISTRICT, BILLINGS, MONTANA,

Defendants.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND PROPOSED ORDER

And unfair labor practice charge was filed with this Board
by complainant charging a violation of Sections 59-1605 (1) (a)
and (b). A hearing was held on December 8, 1976, before Jerry
L. Painter, appointed hearing examiner in the matter. After
reviewing the testimony, evidence, and briefs submitted in
this matter, the following are my findings of fact, conclusions
of law, and proposed order.

I.

FINDINGS OF FACT

1. Helen Widenhofer taught in the Billings School District
beginning in 1959 and dropped out to have a family January, 1961.
She then again began teaching in the school district in 1973.

(Widenhofer, tr. p. 28)

2. During the period of time from 1973-1976, Ms. Widenhofer
taught sixth grade at the Poly Drive School. (Widenhofer,
tr. p. 29)

3. Ms. Widenhofer has a Bachelor's degree in Music and a
Master's degree in elementary education. (Widenhofer, tr.p.29)

1 4. Ms. Widenhofer is a member of the Billings Education
2 Association (BEA) and has been a member during her entire
3 employment with the Billings School District. She has been
4 quite active in BEA's activities including serving as a member
5 of the legislative committee, the committee to provide
6 financial help for people during the strike, and alternate
7 building representative in 1975-76. (Widenhofer, tr. p. 30)

8 5. During the strike which occurred involving the BEA and
9 the Billings School District (District) Ms. Widenhofer actively
10 assisted the BEA in strike preparations. Aside from being a
11 member of the committee for financial aid during the strike, Ms.
12 Widenhofer talked with the various teachers of her school
13 asking them how they felt about a strike at this time.
14 (Widenhofer, tr. p. 31)

15 6. Ms. Widenhofer went out on strike when the strike
16 was called by BEA. Eight other teachers from Poly Drive School
17 went out on strike. (Widenhofer, tr. pp. 33-34)

18 7. One hundred and two non-tenure teachers were absent
19 from their contractual duties during the strike. It can be
20 assumed that they were on strike. (Callen, tr. pp. 241-242)

21 8. Ms. Widenhofer and another teacher Ms. Saylor were
22 the only two Poly Drive teachers to picket the Poly Drive School.
23 (Widenhofer, tr. p. 34)

24 9. Ms. Widenhofer picketed until Friday, October 17,
25 1975, and the strike was ended October 20, 1975. Ms. Widenhofer's
26 picketing was very visible to the parents of the children of
27 her school as they brought and picked-up their children.
28 (Widenhofer, tr. pp. 43-44)

29 10. On November 20, 1975, a group of seven parents asked
30 to have a meeting with Ms. Saylor and Ms. Widenhofer. One of
31 the parents involved was Ms. Bowman.
32

1 a. Notice of the meeting was given to the two teachers
2 involved after lunch that there was going to be a meeting with
3 the parents that afternoon.

4 b. The meeting concerned a question asked by Ms.
5 Widenhofer of Ms. Bowman's daughter, Amy, as to which school
6 Ms. Bowman taught at during the strike. Evidently Ms. Bowman
7 filled in as a teacher when the teachers struck. Ms. Bowman
8 claimed that the school was intimidating and psychologically
9 damaging her child by asking this type of question of Amy.

10 c. The other parents at the conference were parents
11 of Ms. Saylor's students and they were annoyed because Ms.
12 Saylor had told them that the group of sixth graders were a
13 tough group to handle.

14 d. Finally the parents were upset because Ms. Widen-
15 hofer had given a test in which the four sixth grade classes
16 had done poorly. (Widenhofer, tr. pp. 51-53)

17 11. After the meeting with the parents, Ms. Saylor and Ms.
18 Widenhofer expressed their concern over the meeting to Mr. Croff,
19 the school principal, and stated that next time they would either
20 like to have a tape recorder or a BEA representative present.
21 Mr. Croff stated that a tape recorder could not be used without
22 the permission of all persons present at the meeting and also
23 said that the meeting concerned the teachers and the parents
24 and to keep the BEA out of it. (Widenhofer, tr. p. 54)

25 12. At the same conversation with Mr. Croff, Mr. Croff
26 indicated to Ms. Widenhofer that he was disappointed that she
27 had gone out on strike against him because he had hired her.
28 (Widenhofer, tr. p. 54)

29 13. In another incident, Ms. Widenhofer assigned her class
30 to make a family coat of arms. One child made the coat of arms
31 on old paper. Ms. Widenhofer questioned the child if she had
32 done it. When the child replied, "yes", Ms. Widenhofer pointed

1 out that the paper was old and the scotch tape was yellowed.
2 The parents of the child came to the school very upset and
3 explained that the child had used materials that the mother
4 had kept from when she had taught kindergarten.

5 a. Mr. Croff did not attend the meeting with the
6 parents even though it was his policy to usually attend meetings
7 with parents and teachers. (Widenhofer, tr. pp. 57-59)

8 14. On January 28, 1976, Ms. Widenhofer and Ms. Saylor
9 again talked to Mr. Croff concerning some rumors that there was
10 a drive to have them removed from their teaching position.
11 Mr. Croff remarked that the rumors were from the BEA rumor
12 mill. Mr. Croff went on to remark that he had heard rumors
13 that there was a petition being circulated concerning Ms.
14 Widenhofer's removal. (Widenhofer, tr. p. 60)

15 15. On February 3, 1976, Mr. Frank, assistant superinten-
16 dent of school in the elementary division, visited Ms.
17 Widenhofer's room. No written evaluation resulted from that
18 visit.

19 a. After Mr. Frank visited Ms. Widenhofer's room,
20 Ms. Widenhofer had a conference with Mr. Frank. Mr. Frank
21 indicated that he was not there to save Ms. Widenhofer's life
22 or skin, that it might be too late for that. Mr. Frank indi-
23 cated that everyone else in the District had gotten back to
24 normal after the strike except Ms. Widenhofer, that she
25 had held a grudge and that she had upset several parents, and
26 that he had had several phone calls about it. He went on to
27 state that Ms. Widenhofer was not getting along with the staff
28 at Poly Drive and that he, Mr. Frank, did not feel welcome in
29 Ms. Widenhofer's room.

30 b. Ms. Widenhofer asked if Mr. Frank thought a trans-
31 fer would be feasible. Mr. Frank stated no, that they would
32 not bow to parent pressure any more as far as transfers go.

1 c. Mr. Frank said no one should know what was said
2 during the conference except for Ms. Widenhofer's husband. Mr.
3 Frank's suggestion for improvement was that Ms. Widenhofer
4 try to be pleasant and smile alot. Nothing was said about
5 Ms. Widenhofer's classroom performance. (Widenhofer, tr.
6 pp. 60-62)

7 16. Mr. Frank again visited Ms. Widenhofer's classroom
8 on February 12, 1976. Upon his leaving Ms. Widenhofer asked
9 if he had heard anything more from any parents. Mr. Frank
10 said no, and said that he knew Ms. Widenhofer could do the
11 job, just keep smiling. (Widenhofer, tr. p. 63)

12 17. On February 20, 1976, Ms. Widenhofer had a discussion
13 with Mr. Croff. Mr. Croff came into her classroom when she
14 was free and said that nine letters had been admitted to the
15 school board, to Mr. Frank and himself, by parents who were
16 unhappy with what Ms. Widenhofer was doing.

17 a. Four of the letters had been written by parents
18 whose children had been in Ms. Widenhofer's class in previous
19 years.

20 b. Although Ms. Widenhofer requested to see them, and
21 although Mr. Croff agreed to show them to her, later he changed
22 his mind and decided that she should not see them since they
23 had been addressed to him. (Widenhofer, tr. pp. 64-69)

24 18. On February 20, 1976, Mr. Croff asked Ms. Widenhofer
25 how she felt about the situation and if she would ever strike
26 again. Ms. Widenhofer responded that she would never put her
27 family through it again.

28 a. Ms. Widenhofer asked Mr. Croff if he felt all the
29 problems she was having were strike related. Mr. Croff
30 responded that he felt that they were directly strike related.
31 (Widenhofer, tr. pp. 69-70) That the parents had indicated to
32 Mr. Croff that they were unhappy with Ms. Widenhofer because
she had gone out on strike. (Widenhofer, tr. p. 72)

1 19. Mr. Frank again visited Ms. Widenhofer's classroom
2 on February 24, 1976. Mr. Frank's only comment was to keep
3 smiling. (Widenhofer, tr. p. 71)

4 20. Mr. Croff told Ms. Widenhofer that he had to attend a
5 school board meeting to discuss Ms. Widenhofer's evaluation.
6 After the meeting he came into Ms. Widenhofer's classroom and
7 told her that he had said as many positive things about her
8 as he could, but that he did not feel that any decision had
9 been reached at that time.

10 21. Ms. Widenhofer talked to a school board member, Rita
11 Heizer, concerning her problems. Ms. Heizer assured Ms. Widen-
12 hofer that no one was fired at the May 16, 1976, board meeting.
13 (Widenhofer, tr. p. 75)

14 22. The official minutes of the school district, (Com-
15 plaintant's Exhibit 1) shows that at the March 16 board meeting,
16 the school district decided not to renew Ms. Widenhofer's
17 contract.

18 23. On March 26, Ms. Widenhofer had a discussion with Mr.
19 Croff. In their discussion about why the 9 letters were
20 written, Mr. Croff stated that Ms. Widenhofer's association,
21 (BEA) had caused her all of this trouble. They also discussed
22 a transfer, and Mr. Croff agreed that a transfer would be
23 better for he didn't know whose children he could honestly put
24 in Ms. Widenhofer's room. At that same conference Mr. Croff
25 agreed that he was going to observe Ms. Widenhofer one more
26 time. (Widenhofer, tr. p. 77)

27 24. Ms. Saylor, the other Poly Drive teacher who picketed
28 her own school, received a transfer for the next school year.

29 25. On March 29, 1976, Ms. Widenhofer received an evalua-
30 tion. The evaluation was placed in her mail box with a note to
31 please sign it. The evaluation was the result of the observation
32 Mr. Croff had made on February 16, 1976. It has always been the
previous practice of Mr. Croff to have a conference with the
teacher to explain the evaluation. Mr. Croff had always previ-
ously done this with Ms. Widenhofer.

1 a. Article IV, section 8, sub-division 1 of the
2 contract between the school district and BEA provides that a
3 written copy of the evaluation shall be provided 10 days
4 after the observation by the supervisor. The sub-division
5 further provides that each evaluation will be discussed in a
6 conference between the teacher and the supervisor. (Complain-
7 ant's Exhibit 16)

8 b. A conference was set up between Mr. Croff and
9 Ms. Widenhofer to discuss the evaluation, but Mr. Croff refused
10 to discuss the evaluation with Ms. Widenhofer because a BEA
11 Representative, Dave Sexton, accompanied Ms. Widenhofer.

12 c. Mr. Croff did state that the Friday meeting between
13 Ms. Widenhofer and himself was the evaluation conference. Ms.
14 Widenhofer did not, however, have a copy of the evaluation
15 at that time.

16 d. A grievance was filed concerning Mr. Croff's
17 refusal to allow Ms. Widenhofer a BEA Representative during her
18 evaluation conference. (Complainant's Exhibits 17 & 18,
19 Widenhofer, tr. pp. 76-80)

20 e. Article XIII, section 2 provides that a teacher
21 may be represented during any step of the grievance procedure
22 by the association. Section 4 of Article XIII provides that
23 the first step in the grievance procedure shall be discussing
24 the problem with the responsible administrator in an attempt
25 to arrive at a satisfactory solution (Complainant's Exhibit 16).

26 26. On April 9, 1976, Mr. Croff hand-delivered to Ms.
27 Widenhofer two letters from the school board: one was her letter
28 of nonrenewal, the other was a letter denying her grievance.
29 (Widenhofer, tr. p. 82) Ms. Widenhofer was the only nontenured
30 teacher who was terminated (Complainant's Exhibit 4).

31 27. Evaluations: The following evaluations are in Ms.
32 Widenhofer's personnel file:

1 a. An evaluation performed by Mr. Frank dated
2 10/8/73 (Complainant's Exhibit #5b)
3 b. An evaluation performed by Mr. Croff dated
4 11/19/63 (Complainant's Exhibit #5c)
5 c. An evaluation performed by Mr. Croff dated
6 1/10/74 (Complainant's Exhibit #5d)
7 d. An evaluation performed by Mr. Croff dated
8 5/74 (Complainant's Exhibit #5e)
9 e. An evaluation performed by Mr. Croff dated
10 11/14/74 (Complainant's Exhibit #5f)
11 f. An evaluation performed by Mr. Croff dated
12 1/16/75 (Complainant's Exhibit #5g)
13 g. An evaluation performed by Mr. Croff dated
14 3/3/75 (Complainant's Exhibit #5h)
15 h. An evaluation performed by Mr. Croff dated
16 12/19/75 (Complainant's Exhibit #5i)
17 i. An evaluation performed by Mr. Croff dated
18 3/26/76 (Complainant's Exhibits 5j and 5k. The evaluations
19 5j and 5k are identical except 5k is dated 4/9/76. Both are
20 unsigned by Ms. Widenhofer.)

21 20. On April 5, 1976, Ms. Widenhofer checked her personnel
22 file. She found a number of letters in her file which she was
23 not aware existed nor that they were placed in her personnel
24 file. (Widenhofer, tr. p. 95) All the letters were derogatory
25 towards Ms. Widenhofer and were all dated between February 6
26 and February 11, 1976. (Complainant's Exhibit 5k) (The Foreman
27 letter, which was supportive of Ms. Widenhofer and is part of
28 exhibit 5k was not in the file on April 5.)

29 a. The placing of the letters in the file without
30 notifying Ms. Widenhofer was contrary to the existing contract
31 between the school district and the SEA. (Complainant's
32 Exhibit 16, Article IV, Section 3, Subd. 2)

1 29. On April 29, 1976, Ms. Widenhofer requested a hearing
2 before the school board concerning her termination. The hear-
3 ing was held on May 23, 1976.

4 a. Present at the hearing were Mrs. Poppler, Mr. Sipes,
5 and Mr. Bradford, all School Board members, and Mr. O'Hare, Mr.
6 Serrette, Mr. Callen, Mr. Croff, Mr. Frank, administrators,
7 and Mr. Baugh, the Board's attorney. Witnesses were presented
8 by Ms. Widenhofer.

9 b. The result of the hearing was that Ms. Widenhofer's
10 termination was upheld. (Widenhofer, tr. pp. 129-135)

11 30. A number of letters were written in support of Ms.
12 Widenhofer, praising her ability as a teacher. (Complainant's
13 Exhibits 7a-7f, 8, 13)

14 31. Ms. Widenhofer, accompanied by Edwin L. Ward, Vice-
15 President of NEA, checked her personnel file on three different
16 occasions, April 5, 1976; May 10, 1976; and September 22, 1976.
17 Complainant's Exhibits 14 and 15 show what was in the file
18 upon each check. Mr. Ward witnessed both of the exhibits.

19 32. The letters praising Ms. Widenhofer were not in her
20 file upon checking. Ms. Widenhofer asked Joseph Callen,
21 administrative assistant to the superintendent of school, to
22 find out where the letters were and to place them in her file.
23 Mr. Callen gathered all the letters he could and placed them
24 in her file accompanied by a cover letter to Ms. Widenhofer
25 and copies of the letters (Exhibit 5k) as well as an evaluation
26 by Mr. Croff dated April 9, 1976. All but one of the letters
27 were derogatory. They were the same letters referred to in
28 Finding of Fact #28 (Callen, tr. pp. 242-243).

29 a. Doris Poppler, chairperson of the school board,
30 testified there is no policy in the school district of what to
31 do with letters received by board members concerning teachers;
32 therefore, there is no reason the above letters should be in
Ms. Widenhofer's file. (Poppler, tr. p. 224)

1 33. Doris Poppler, chairperson of the school board testified
2 that the school board based their decision not to renew Ms.
3 Widenhofer's contract on the basis of the evaluations contained
4 in Ms. Widenhofer's personnel file and the recommendations of
5 the administrators involved. Ms. Poppler further testified that
6 the letters contained in Ms. Widenhofer's file (Complainant's
7 Exhibits 5k-5l), were not used in the school board's determin-
8 ation not to rehire Ms. Widenhofer. Ms. Poppler stated to use
9 the letters in its determination would result in a popularity
10 contest. (Poppler, tr. p. 214, 219, 226, Complainant's Exhibit
11 5, letter of nonrenewal addressed to Ms. Widenhofer and signed
12 by Doris Poppler, dated April 9, 1976.)

13 34. In explaining how the school board came to its conclu-
14 sion not to renew Ms. Widenhofer's contract, Ms. Poppler testified
15 that the Board members closely questioned Mr. Frank and Mr.
16 Croff concerning their evaluations. Ms. Poppler testified that
17 the evaluations are written in "educationese" and that although
18 on their surface the evaluations look very good, that when
19 interpreted in "educationese" there is a constant theme of
20 impatience and sarcasm that runs through Ms. Widenhofer's evalu-
21 ations. Specifically, Ms. Poppler points to the following
22 examples:

23 a. Exhibit 5b, the evaluation by Mr. Frank dated
24 10/8/73: "The best way to help youngsters at this time is to
25 work closely with Mr. Croff since he knows the youngsters'
26 background and has had a great deal of experience in this
27 area."

28 (1) According to Ms. Poppler that statement was made
29 because Ms. Widenhofer had difficulty controlling her temper
30 with the students, that she was sarcastic to youngsters and
31 that they were unhappy in her class. (Poppler, tr. pp. 217-228)

32 b. Exhibit 5c, the evaluation by Mr. Croff dated

1 11/19/73: "You have shown a sincere concern for the children
2 and appear to have their respect at this time. You may need to
3 call upon your patience to keep it that way." Also: "Your
4 discipline is good, but I want to encourage you to 'keep your
5 cool' while dealing with the children". (Poppler, tr. p. 229)

6 (1) According to Ms. Poppler that statement was made
7 because Ms. Widenhofer had difficulty keeping her cool with
8 youngsters. (Poppler, tr. p. 229)

9 c. Exhibit 5d, evaluation by Mr. Croff dated
10 1/10/74: "At this point, I would still encourage you to keep
11 your patience with the children. Even though you may have some
12 that concern you, take a positive attitude and with the help
13 of pupil services and other, we will try to alleviate some of the
14 problems."

15 (1) Again, according to Ms. Poppler, the statement
16 meant that Ms. Widenhofer was having trouble keeping her patience
17 with the children. (Poppler, tr. p. 230)

18 d. Exhibit 5e, the evaluation by Mr. Croff dated
19 5/74: Ms. Poppler could give no specific comment on this
20 evaluation.

21 e. Exhibit 5f, the evaluation by Mr. Croff dated
22 11/14/74: Ms. Poppler commented that that evaluation was good.
23 (Poppler, tr. p. 232)

24 f. Exhibit 5g, the evaluation by Mr. Croff dated
25 1/16/75: Ms. Poppler stated that this was a good evaluation.

26 g. In Exhibit 5h, the evaluation by Mr. Croff dated
27 3/3/75, under teacher-pupil evaluation: "Other items mentioned
28 in earlier evaluations still apply."

29 (1) Ms. Poppler stated that that comment specifically
30 applied to the attitude that was causing some problems with the
31 students in the classroom, that with some of the students there
32 was a sarcastic attitude and a harsh attitude. (Poppler, tr.
p. 232.)

35. The evaluations of Ms. Widenhofer evaluating Ms. Widenhofer's performance after the strike (Exhibit I, dated December 19, 1975 and Exhibit J, dated March 26, 1976, and Exhibit K, dated April 9, 1976) were quite negative. The negative remarks were as follows:

a. Complainant's Exhibit 51 dated December 19, 1975:

II. TEACHER-PUPIL RELATIONSHIPS

It appears that better attitudes toward mutual respect and understanding than now prevails in your classroom needs to be developed. Some pupils are apparently disturbed by some statements you have made to them during classtine.

III. INSTRUCTIONAL SKILLS

It seems that a better communication process needs to be developed between you and the children, particularly concerning tests and evaluative processes.

IV. CLASSROOM MANAGEMENT

Effective discipline is maintained in your classroom, but in my opinion, there is need for better pupil-teacher relationship for effective classroom learning environment.

V. STAFF RELATIONSHIPS AND PROFESSIONAL TRAITS

Your attitude toward several staff members of this school particularly during the October-November time period have been one of coolness and unfriendliness.

You have demonstrated support for your professional organization.

VI. TEACHER-PARENT-COMMUNITY RELATIONS

As you know, some parents are concerned about apparent statements you have made to their children in the classroom. I would suggest you try to keep statements on a positive note, and for the near future keep them limited to things that pertain to the benefit of the children's growth.

VII. PLANS FOR IMPROVEMENT AND GROWTH

2. There is no place for holding grudges or displaying poor attitudes in this school. Show respect for other staff members and their ideas and beliefs, even though they may not agree with yours.

1 3. Use a positive approach when working with
2 children and be extremely careful on the kinds
3 of statements you made to them so there is
4 little room for them to think it is a "put
5 down", a distrust, or some kind of negative
6 response that may be detrimental to their self-
7 image.

8 VIII. OVERALL PERFORMANCE IS (SATISFACTORY)
9 (UNSATISFACTORY)

10 All the areas are satisfactory except for those
11 I express concern about and related to numbers
12 2 and 3 above. (Section VII) I have seen much
13 improvement in item 2, (Section VIII) this month,
14 and hope this continues to improve. If these
15 do not improve in the next 2-3 months, I will
16 not recommend you for re-employment."

17 b. Complainant's Exhibit 5j, March 26, 1976:

18 "I. PERSONAL TRAITS

19 As discussed earlier, the methods of diplomacy
20 that you have used in some instances could have
21 been improved.

22 II. TEACHER-PUPIL RELATIONSHIPS

23 Concerns have been expressed since our evaluation
24 conference in December.

25 Positive attitudes towards mutual respect and
26 understanding is still lacking.

27 V. STAFF RELATIONSHIPS AND PROFESSIONAL TRAITS

28 The general relationship with the staff has
29 appeared to improve somewhat, but improvement
30 is still needed.

31 VI. TEACHER-PARENT-COMMUNITY RELATIONS

32 Parent and community relations are in a stage
of deterioration.

VIII. OVERALL PERFORMANCE IS (SATISFACTORY)
(UNSATISFACTORY)

I do not recommend that you be rehired next
school term."

II.
DISCUSSION

A charge of union interference, i.e., the dismissal of an
employee for union activities, presents a very difficult problem
for the hearing examiner. On the one hand this Board is very
reluctant to interfere with the rights of an elected body to

1 hire and fire as it sees fit, but on the other hand, the
2 dismissal of a teacher for union activities can have severe
3 ramifications for the teacher, for the union, and for public
4 employee collective bargaining. The ramifications even become
5 more severe for the teacher if the dismissal was done under
6 the guise of incompetency when in fact the dismissal is a
7 result of her union activities. Finally, the problem is
8 further complicated by the fact that dismissal of an employee
9 for union activities is a difficult charge to prove with direct
10 evidence and generally involves a high percentage if not
11 totally circumstantial evidence.

12 This Board has not established a large number of precedent-
13 setting cases in this area. Since Section 59-1605 (1) (a) is
14 similar to Section 8 (a) (3) of the LMRA we can turn to the
15 private sector decisions for guidance. The federal court of
16 appeals (3rd circuit) has held that an employer may discharge
17 an employee for a good reason, for a poor reason, or for no
18 reason at all so long as the provisions of the statute are not
19 violated. (NLRB v. Condenser Corp., 126 F.2d 67, 10 LRRM 483)
20 The federal court has also held that even where an employer has
21 otherwise valid reasons for discharge, if the discharge of
22 an employee is even partially motivated by his union activity,
23 it is unlawful. (NLRB v. Princeton Inn Co., 424 F.2d 264,
24 (3rd Cir 1970) 73 LRRM 3002.)

25 In NLRB v. Okla-Inn, 84 LRRM 2585 (10th cir. 1973), the
26 quality of evidence required was set forth. The court said
27 at pages 2591 and 2592 that it must be established,

28 "By acceptable substantial evidence on the whole
29 record, that the discharge came from the forbidden
30 motives of interference in employee statutory
31 rights. . . . The law requires evidence that X
32 extends beyond mere suspicion, that amounts to
more than a mere scintilla. . . . However, it
is not . . . always necessary for the Board to
explicitly show beyond a reasonable doubt that
the employer had absolute knowledge and was

1 completely aware of the discharged employees
(sic) close connection to the Union
2 Where there is substantial evidence, direct
or circumstantial, to indicate that an
3 employee was discharged for union activities, a
very definite burden is imposed on the employer
4 to prove existence of a reason, not within
the Act's provisions, sufficient to warrant
5 the discharge."

6 Adopting the above views, it becomes clear that this Board's
7 authority is limited to that instance where it can be shown
8 that an employee was discharged for union activity. However,
9 if the discharge was partially motivated by the employee's
10 union activity, it is unlawful. Finally if there is substantial
11 evidence that an employee was illegally discharged for union
12 activity, then the burden is on management to show the reason
13 for discharge was not union related.

14 My Findings of Fact show that there were approximately
15 102 non-tenured teachers on strike, and that Ms. Widenhofer
16 was the only non-tenured teacher not renewed. My findings
17 also show that Ms. Widenhofer and Ms. Saylor were the only
18 two teachers employed at Poly Drive School who picketed that
19 school. Ms. Widenhofer was terminated, Ms. Saylor was trans-
20 ferred to another school.

21 My findings also show that some parents at Poly Drive
22 School, were very upset with Ms. Widenhofer and Ms. Saylor
23 and considering the timing of the hostile meeting between the
24 parents and the teacher, it is obvious that the meeting was
25 the result of an anti-strike sentiment.

26 Analyzing Ms. Widenhofer's evaluations, we can see that in
27 her first year back at teaching she might have been having a
28 problem with certain children. (SEE: Exhibits 5b, 5c, and
29 5d) It appears that Ms. Widenhofer improved herself with the
30 guidance of her supervisors. The evaluations dated 5/74,
31 11/14/74, 1/16/75, and 3/3/75 all were satisfactory evaluations.
32 In fact, Ms. Poppler admitted that the 11/14/74 and 1/16/75 were

1 both good evaluations. (Ms. Poppler did testify that the
2 3/3/75 evaluations which states under "Teacher-Pupil Relation-
3 ship: that "Other items mentioned in earlier evaluations still
4 apply", was referring back to the problem Ms. Widenhofer had in
5 Exhibits 5b, 5c, and 5d. I, however, interpret that remark to
6 be directed to the more favorable 11/14/74 and 1/16/75 evalua-
7 tions that were done earlier in that same school year, and,
8 therefore, it was not a negative comment.) So it is obvious
9 that Ms. Widenhofer improved in her student-teacher relation-
10 ship from her first year.

11 Right after the strike, the evaluations became very nega-
12 tive concerning Ms. Widenhofer's relationship with her students,
13 with parents, and with her fellow teachers. Prior to receiving
14 those evaluations Ms. Widenhofer and Ms. Saylor were called
15 on the carpet by a group of parents, without the aid of their
16 principal, Mr. Croff. All of this was contrary to previous
17 practice.

18 There is no doubt that the pressure was on from the parents
19 to get rid of Ms. Widenhofer, and again there is no doubt that
20 the drive to get rid of Ms. Widenhofer was a result of her
21 strike activity. It was Ms. Widenhofer's uncontroverted
22 testimony that Mr. Croff felt all of her problems were strike-
23 related. It was also Ms. Widenhofer's uncontroverted testimony
24 that Mr. Frank stated that they would not bow to parent pressure
25 any more as far as transfers go. Mr. Frank had indicated that
26 everyone else in the district had gotten back to normal after
27 the strike except Ms. Widenhofer, and that she had held a
28 grudge and that she had upset several parents. Mr. Croff had
29 agreed that a transfer would be better for he didn't know whose
30 children he could honestly put in Ms. Widenhofer's room.

31 Although it is not contrary to Chapter 16, Title 59 for
32 parents to discriminate on the basis of union activity, it

1 does become an unfair labor practice if the school administra-
2 tion joins in.

3 Three incidents happened after the strike which affected
4 her teacher-student, teacher-parent relationship:

5 (1) She gave a test in which all the students did poorly.
6 She is alleged to have been in the wrong because she did not
7 tell her students that the test would not count heavily in her
8 determination of their grade.

9 (2) She asked one of her students where her mother taught
10 during the strike. It is alleged that this was an insensitive
11 question concerning the circumstances, but it was no more
12 insensitive than a principal writing, "You have shown support
13 for your professional organization" on a teacher's evaluation
14 after the strike.

15 (3) She questioned a pupil about turning in a coat of arms
16 using paper with pin marks in it and old scotch tape. Consid-
17 ering the circumstances, it is logical that she should inquire
18 of the student concerning the old paper and scotch tape used,
19 but the manner in which she inquired is at dispute. She left
20 the child with the impression that she did not believe she was
21 telling the truth. Ms. Widenhofer did not believe the child
22 was telling the truth, and had the child explained, Ms. Widenhofer
23 testified she would have better understood why the coat of arms
24 looked as it did.

25 The question becomes, do these problems warrant the drastic
26 change in the evaluations that occurred after the strike, or are
27 they just a front for dismissing Ms. Widenhofer for her strike
28 activity? To answer that question, we must turn to the
29 surrounding behavior of the administration involved. In the
30 school board's termination letter to Ms. Widenhofer the school
31 board stated that Ms. Widenhofer was terminated because of
32 evaluations from Mr. Croff. At the hearing for Ms. Widenhofer

1 by the school board, Ms. Widenhofer was told that she was
2 terminated because of evaluations of Mr. Croff and Mr. Frank.
3 Mr. Frank had only one written evaluation in Ms. Widenhofer's
4 file, which was performed her first year back (1973-74). The
5 following year Ms. Widenhofer's evaluations were good. There-
6 fore, Mr. Frank's evaluation is of little use to us in reaching
7 a decision. When Mr. Frank did visit Ms. Widenhofer's room for
8 observation after the strike, his only constructive criticism
9 was to keep smiling. At the time, Ms. Widenhofer had little to
10 smile about, and it is difficult to discern whether or not she
11 followed that advice.

12 Mr. Croff had exhibited very negative reactions after the
13 strike to Ms. Widenhofer because she chose to picket her school
14 and was quite active in the strike. It was Ms. Widenhofer's
15 uncontroverted testimony that Mr. Croff remarked that he was
16 disappointed that she had gone out on strike against him because
17 he had hired her. He had in essence deserted Ms. Widenhofer in
18 her problems with the parents by refusing to attend the parent
19 conferences which before he had attended. He refused to show
20 Ms. Widenhofer the letters he had received from the parents so
21 that she might be able to explain them to defend herself against
22 them. After observing Ms. Widenhofer, Mr. Croff failed to
23 comply with the existing collective bargaining agreement and
24 provide her with a copy of the evaluation within the 10-day time
25 limit. Ms. Widenhofer found her March 26, 1976, evaluation in
26 her mailbox, which is a different procedure for Mr. Croff. Mr.
27 Croff failed to have a conference concerning the evaluation.
28 (Mr. Croff claims that the Friday conference of March 26, 1976,
29 was the conference concerning the evaluation. However, Ms.
30 Widenhofer did not have a copy of the evaluation at the time,
31 therefore it would be difficult to have a conference concerning
32 it. If the teacher isn't even aware that the conference she

1 was having had been her evaluation conference, then the purpose
2 of having the conference could hardly have been accomplished.
3 Furthermore, Mr. Croff had agreed to a conference, which is not
4 consistent with his position that a conference had been held.

5 As was stated previously, Mr. Croff stated all Ms. Widen-
6 hofer's problems were strike related. Mr. Croff at the March
7 26, 1976, meeting with Ms. Widenhofer stated that her association
8 (BEA) had caused her all of her trouble. He did not state
9 that her poor professional habits had caused her all of her
10 troubles. Mr. Croff refused to meet with Ms. Widenhofer when Mr.
11 Sexton was present even though the contract allows Ms. Widenhofer
12 to be represented at all stages of a grievance including the
13 first step which is an informal conference with her supervisor.
14 I find that without a doubt, the behavior of Mr. Croff shows
15 a hostile attitude toward the BEA and towards Ms. Widenhofer
16 because of her activities including strike activities. Such
17 statements as "Your organization caused you all of your problems"
18 and "All of your problems are strike related" makes Mr. Croff's
19 evaluation subject to close scrutiny, and expressing dissatisfac-
20 tion because Ms. Widenhofer had struck against him makes clear
21 that Ms. Widenhofer's evaluations are tainted with union animus.

22 To have gone from a year of excellent evaluations to very
23 poor evaluations after the strike is highly suspect. The fact
24 that Ms. Seyler, the only other teacher to picket her school,
25 ended up in a transfer even leads to more suspicion. The parents'
26 open animosity after the strike to the two picketing teachers
27 compounds the problems. And Mr. Croff's open hostility and
28 irregular behavior creates any doubt in the hearing examiner's
29 mind that Ms. Widenhofer was a victim of an anti-union campaign
30 led by certain parents and condoned and participated in by Mr.
31 Croff. The juggling of Ms. Widenhofer's file and the inclusion
32 of derogatory matter without having been given notice contrary to
contractual agreement is again a sign that not everything was on
the up-in-up.

1 Finally the fact that the school district did not call Mr.
2 Croff and Mr. Frank as witnesses, when they could have testified
3 and refuted the strong evidence against the school district
4 adds credence to my decision.

5 I should point out that I cannot find that the school board
6 was aware of this matter. The school board members only relied
7 on its administrators, which is only proper. The school board
8 may have been lax in not obtaining sufficient testimony from
9 Ms. Widenhofer's side in its hearing for Ms. Widenhofer, but
10 it certainly can't be said that they openly sanctioned Mr.
11 Croff's behavior. However, since Mr. Croff is an agent of the
12 school board, the school board is responsible for his behavior
13 and having dismissed Ms. Widenhofer because of Mr. Croff's eval-
14 uations as was stated in her letter of nonrenewal, they terminated
15 Ms. Widenhofer because of her union activity.

16 III.

17 CONCLUSION OF LAW

18 I conclude Ms. Widenhofer was dismissed in violation of
19 section 59-1605 (1) (a) and (b). The hearing examiner adopts
20 the logic of the United States Supreme Court in its determination
21 that an employer will be presumed to have discriminated against
22 the employee for the purpose of encouraging or discouraging union
23 activity if such encouragement or discouragement is a "foreseeable
24 consequence." (Radio Officers' Union of Commercial Telegraphers'
25 Union, AFL v. NLRB, 347 U.S. 17, 13 LRRM 2417 (1954)). The
26 "foreseeable consequence" of terminating Ms. Widenhofer for union
27 activities is the discouragement of union activity. It is,
28 therefore, presumed that by the termination of Ms. Widenhofer
29 the employer has interfered with the administration of a labor
30 organization. Further it is presumed that the employer has
31 interfered with its employees' rights as guaranteed in Section
32 59-1603.

PROPOSED ORDER

IT IS ORDERED THAT within 20 days after this Order becomes final:

(1) That Helena Widenhofer shall be reinstated as an elementary teacher in the school district in any school mutually agreeable to Ms. Widenhofer and the school district other than the Poly Drive Elementary School.

(2) Ms. Widenhofer shall be awarded full back pay and benefits including longevity.

(3) The school district shall remove from Ms. Widenhofer's file the evaluations dated December 19, 1975; March 26, 1976; and April 9, 1976, all signed by Clayton Croff.

(4) A representative for the school district shall send a letter to the Administrator of the Board of Personnel Appeals stating how this order has been complied with.

NOTICE: Exceptions may be filed to these Findings of Fact, Conclusions of Law, and Proposed Order within twenty (20) days after service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Proposed Order shall become the Final Order of the Board.

DATED this 18th day of July, 1977.

BOARD OF PERSONNEL APPEALS

BY Jerry L. Painter
Jerry L. Painter
Hearing Examiner